

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 315
[2018 1057 S]

BETWEEN

MICROSOFT IRELAND OPERATIONS LIMITED

PLAINTIFF

-AND-

ARABIC COMPUTER SYSTEMS

AND

NATIONAL TECHNOLOGY GROUP

DEFENDANTS

AND BY WAY OF COUNTERCLAIM

ARABIC COMPUTER SYSTEMS

COUNTERCLAIM PLAINTIFF

-AND-

MICROSOFT IRELAND OPERATIONS LIMITED

AND

MICROSOFT ARABIA COMPANY LIMITED

COUNTERCLAIM DEFENDANTS

RULING of Mr. Justice Mark Sanfey delivered on the 29th day of June 2022

Introduction

1. This ruling relates to a motion by the first named defendant/counterclaimant (“ACS”) for discovery of categories of documents in respect of which the parties have not been able to agree. In addition to ACS’s motion, there was also a motion on behalf of the plaintiff and counterclaim defendants (“MIOL” and “MACL”) which, as with ACS’s motion, was the subject of protracted correspondence and liaison between the respective legal teams. Fortunately, the terms of an order in relation to the MIOL/MACL motion were ultimately agreed between the parties, agreement in relation to the final category being achieved during the hearing of ACS’s motion. I am therefore only concerned with the ACS motion.

2. Both motions, and in particular the ACS motion, were the subject of protracted correspondence between the respective solicitors, Matheson for the plaintiff/counterclaim defendants, and Hayes Solicitors (“Hayes”) for the defendants/counterclaim plaintiff. In relation to the ACS motion, this correspondence continued up to and including the day of the hearing, 15th June, 2022. The initial letter from Hayes to Matheson of 23rd December, 2021 requested discovery of 11 categories. After some correspondence between the parties, this request, in which the categories contained a number of subdivisions, was revised so that Hayes in its letter of 27th January, 2022 now sought 47 categories of documents. The extensive correspondence which ensued whittled down the number of categories, so that a relatively small number of categories remained to be decided by the court. Nonetheless, there was an intense level of debate in relation to these categories, which were the subject of affidavit evidence and detailed written submissions in addition to the oral submissions from counsel at the hearing.

3. The purpose of this ruling is simply to communicate my decision in relation to the categories in dispute. While the submissions made reference to various authorities which bear upon the disputed categories, there was little or no dispute as to the principles to be applied. I

do not therefore propose in this ruling to say much about the course of negotiation of the various categories between the parties, save as is relevant to the discussion of my decision in each case; likewise, reference to the facts of the case or what is contained in the pleadings will only be made in as far as same is relevant to the disputed categories.

The proceedings

4. A very brief description of the proceedings is appropriate. The action was commenced by summary summons on 24th August, 2018. The plaintiff seeks judgment against the first defendant in the sum of over \$31 million USD, which the plaintiff alleges is due to it in connection with three commercial agreements, referred to in the pleadings as Microsoft Channel Partner Agreements. The second defendant (“NTG”) is sued on foot of a guarantee of 19th December, 2011 by which it is alleged that NTG agreed to guarantee and indemnify the plaintiff in respect of the payment of certain debts to the plaintiff, including the debts alleged to be due in the proceedings by ACS.

5. It seems that the defendants challenged the jurisdiction of the Irish courts and sought to set aside the order granting leave to serve the proceedings on the defendants in Saudi Arabia. The defendants argued that the choice of law and exclusive jurisdiction clauses in the channel partner agreements and the guarantee could not establish jurisdiction in favour of the Irish courts. The High Court (Barniville J.) delivered a judgment on 30th October, 2020 in which the application to set aside service was dismissed. The parties consented to the proceedings being adjourned to plenary hearing.

6. MIOL delivered a statement of claim on 27th November, 2020, and subsequently delivered an amended statement of claim. The defendants delivered a defence, which included a counterclaim by ACS, on 17th September, 2021. In this counterclaim, ACS joined MACL as a defendant to the counterclaim.

7. In the affidavit grounding the motion for discovery of 2nd February, 2022, Gillian Cotter of Hayes on behalf of the defendants summarises the counterclaim at para. 9 of her affidavit, stating that “ACS alleges that MIOL and Microsoft Arabia are parties to a multi-stranded conspiracy, advanced by lawful and unlawful means, as a consequence of which ACS has suffered financial loss”. Ms. Cotter avers that the conspiracies, which are articulated in detail in the counterclaim, include:

- An allegation that MIOL and MACL (together, “the Microsoft entities”) conspired to sabotage the sale by ACS of Arabsoft, an internal division having a contemporary value of 43 million USD;
- Allegations that the Microsoft entities conspired to spread false and damaging rumours among ACS’s clients that ACS was on the verge of bankruptcy;
- An allegation that the Microsoft entities conspired to undermine ACS’s participation in Saudi public tenders;
- A refusal by MACL and/or MIOL to honour orders placed by ACS and MIOL’s insistence on ACS’s customers signing change of channel partner agreements before filling an order placed by ACS;
- Diverting business away from ACS towards its competitors;
- Requiring ACS to place software orders with Microsoft based on letters of intent from the end customer, as opposed to a formal tender agreement or contract which, ACS alleges, caused many end customers to reduce or cancel their order, although MIOL refused to allow ACS to reduce or cancel its order in such circumstances;
- Causing unjustified investigations into ACS’s business practices to be conducted, and informing ACS’s customers that ACS had been accused of corruption.

8. An extensive notice for particulars of the defence and counterclaim was delivered on behalf of the Microsoft entities; detailed replies to particulars were delivered on behalf of ACS. On 16th November, 2021, a very detailed reply and defence to counterclaim was delivered on behalf of the counterclaim defendants. On 2nd December, 2021, a rejoinder and reply to defence to counterclaim was delivered on behalf of the counterclaim plaintiff, ACS.

The disputed categories

9. Hayes indicated in a letter of 6th May, 2022, after detailed correspondence between the respective solicitors, which categories were agreed and which remained outstanding. A comprehensive response to this letter issued from Matheson on 8th June, 2022. Hayes responded to this letter on 14th June, 2022 – the day before the hearing – and Matheson replied to this letter by a letter of 15th June, 2022, which it produced to the court at the hearing. For the benefit of the court, a very helpful chart was produced which set out the respective contentions of the parties as to the appropriate wording, and which provided a summary from which the court and the parties could work. It is primarily to this document that I make reference in the paragraphs below.

Category 12 (ii) – (iii)

10. In its letter of 8th June, 2022, Matheson suggested a wording which would answer both elements of this request. In its response of 14th June, 2022, Hayes suggested the following formulation:

12 (ii) All documents evidencing the delivery of the items or products identified in the claimed invoices to ACS at the “ship to” address referred to in the invoices.

12 (iii) All documents concerning the ordering of, the delivery to and the use of the items or products identified in the claimed invoices by the end customers.

11. In its letter of 15th June, 2022, Matheson agreed 12 (ii) but not 12 (iii) and commented that this reformulated category “now appears to be much broader than previous versions of your client’s request and is refused for the reasons set out in our previous correspondence”.

12. ACS argues that the new formulation is in fact more precise than its original formulation, which was more general. The main argument between counsel at the hearing centred around why documents as to “use of the items... by the end customers” would be necessary.

13. Counsel for ACS argued that a document showing that a licence has been used by the end customer is relevant to the question of whether it was actually delivered. If it transpired for instance that, in relation to a number of the products alleged to have been delivered by Microsoft, there was no documentation which confirmed that the licenced products had ever been used by the said customers, this might raise a question as to whether the products had ever been delivered; as counsel put it at p. 118 lines 20 to 23 of the transcript, “...a licence is simply permission to use something and the demonstration of it being delivered is that the person to whom it has been given makes use of it”. While it is certainly possible that a licence could be delivered to an end customer but not used – for whatever reason – I accept that documents evidencing use are relevant to the question of delivery, particularly where the product being delivered does not have physical form, like a consignment of widgets.

14. I am of the view however that the ACS formulation is too wide, as it relates to “... all documents concerning ... use of the items or products ...”. This seems to me to be potentially a very wide category which could be burdensome and not strictly necessary for ACS’s purposes.

15. I propose to order the formulation of category 12 (ii) agreed by the parties, and to make the following order in respect of category 12 (iii):

“In case of each such item or product identified in the aforesaid claimed invoices, a document or documents which indicate that such items or products were used by the end customer.”

16. Therefore, if there were one document which established definitively that the end customer had received the items or products, it would not be necessary to discover any further documents in relation to “the use of the items or products identified in the claimed invoices by the end customers”.

Category 16

17. After a clarification from counsel, it was established that the wording “as per ACS request” set out in the chart emanated from a letter of 27th January, 2022 rather than 6th May, 2022. Matheson’s response in its letter of 8th June, 2022 was in fact a response to the formulation by Hayes of category 16 in its letter of 7th March, 2022 as “... any documents limited to anything showing ACS’s share in Microsoft business in Saudi Arabia and Microsoft’s dependence on ACS’s business between September 2013 to September 2017”.

18. Counsel contends that this category arises from para. 39 of the counterclaim, which is as follows:

“39. ACS regularly tenders for public contracts and projects, which often involved the large-scale provision of Microsoft licenced offerings. Since in or around 2013, when ACS’s market share for the re-sale of Microsoft licenced offerings was around 60%, MIOL and Microsoft Arabia, acting in combination, unlawfully conspired to injure ACS by unlawful means by undermining ACS’s participation in public tenders, and specifically the prospect of ACS succeeding in any of those competitive tenders.”

19. ACS contends that the documents it seeks will show that the motivation for the alleged conspiracy was a concern about the concentration of the market share that ACS had in the Microsoft products reselling market in Saudi Arabia. In its suggested wording of 8th June, 2022,

Matheson acknowledges “that ACS was a significant vendor of Licenced Offerings in the Saudi Arabian market between 2013 and 2017”, and confirms “that ACS held a significant share of Microsoft volume licencing market in the Saudi market” for that period. It contends that discovery is accordingly unnecessary.

20. The premise of the request by ACS is that, when ACS’s market share got to a certain level, this caused the Microsoft entities to conspire to injure ACS by undermining their participation in public tenders. In my view, this involves speculation as to a motive on the part of the Microsoft entities; ACS wishes to trawl for documentation to see if there is anything which will support this theory. As it is, ACS has the acknowledgment of the Microsoft entities that it had a significant market share between 2013 and 2017. It sets out at para. 40 of the counterclaim detailed allegations as to how the Microsoft entities effected this alleged conspiracy.

21. It seems to me that ACS will either be able to prove the conspiracy or not; I do not think it is entitled to a speculative trawl of the Microsoft entities’ documents to see whether its theory as to the motivation behind the alleged conspiracy is correct. In the circumstances, and in view of the acknowledgment provided in the Matheson letter of 8th June, 2022, it does not appear to me appropriate to order discovery in the terms sought by ACS.

Category 20

22. Categories 18, 19 and 20 arise from paras. 35 to 38 of the counterclaim. In these paragraphs, ACS alleges that the Microsoft entities “unlawfully conspired to injure ACS by unlawful means by spreading false and defamatory rumours amongst ACS’s clients that ACS was on the verge of bankruptcy, thereby inducing ACS’s customers to breach their contracts with ACS”.

23. Categories 18 and 19 relate to documents evidencing communications by the Microsoft entities to customers of the alleged rumours. Category 19 in particular sets out a number of

specific customers to whom it is alleged communications by employees of the Microsoft entities were made. Categories 18 and 19, through the process of engagement between the respective solicitors, have been resolved by agreement.

24. However, category 20 is still in dispute. The request as per Hayes letter of 6th May, 2022 was as follows:

“Any communications between MIOL and Microsoft Arabia regarding the solvency of ACS, and regarding any communications with third parties in relation to the solvency of ACS or ACS’s status as a re-seller partner between 1 January, 2016 to June 2018”.

25. MIOL/MACL have taken the view that what is sought is internal communications between MIOL and MACL in relation to the communications referred to in category 19, and in its letter of 8th June, 2022, has offered a wording to cover this. Counsel for ACS argues that the category it has sought seeks a wider range of documents than is offered. ACS contends that it needs to know if the alleged agreement or “plan” between the two entities was that they would contact the specific customers set out in category 19, or whether the alleged plan was a more general one which involved spreading rumours to customers generally.

26. It seems to me that para. 35 of the counterclaim alleges a general unlawful conspiracy, and in para. 36 offers instances in which it says that conspiracy was put into effect. It does not seem to me however that paras. 35 and 36 limit the alleged conspiracy to the specific instances set out in para. 36.1.

27. It appears that the allegation in paras. 35 to 37 is quite focused, and allows the Microsoft entities to understand the nature of the allegation. In those circumstances, and given the essentially clandestine nature of the alleged conspiracy, it seems to me that ACS is entitled to any internal documentation between the Microsoft entities which might suggest that the plan was a general one, rather than limited to the specific customers set out in para. 36.1. While ACS is not permitted a speculative trawl of the counterclaim defendants’ documentation, it is

entitled to pursue a line of inquiry which follows naturally from very specific allegations it has made in order to see whether the conspiracy it alleges was a more general one, or whether it was limited to the entities set out in para. 36.1.

28. Accordingly, I will order that discovery be made of the category as set out in the letter from Hayes of 14th June, 2022 as follows:

“Any communications between MIOL and Microsoft Arabia regarding the solvency of ACS, and any communications between MIOL and Microsoft Arabia regarding communications to third parties in relation to the solvency of ACS and/or ACS’s status as a re-seller between the period 1 January 2016 to June 2018.”

Category 23

29. This category relates to the allegations at paras. 39 to 43 of the counterclaim. As para. 39 puts it, it is alleged that the Microsoft entities “... acting in combination, unlawfully conspired to injure ACS by unlawful means by undermining ACS’s participation in public tenders, and specifically the prospect of ACS succeeding in any of those competitive tenders.”

30. Once again, this category has been the subject of extensive correspondence. A wording proposed by Hayes in its letter of 6th May, 2022 was rejected by Matheson in its letter of 8th June, 2022 as “far too broad, vague and disproportionate, and is quite clearly a speculative fishing exercise. At the very least, ACS must be required to narrow the contours of any such category on this issue by identifying the specific public tenders in contemplation (if any), together with the relevant dates for any such tenders ...”.

31. The response from Hayes of 14th June, 2022 seeks the following documents:

“All documents relating to, concerning or evidencing the final approved discount (agreed) internally by MIOL and/or Microsoft Arabia in relation to the tenders listed at Attachment 8 and Attachment 9 to the Replies to Particulars and the communicated discount to ACS. For the avoidance of doubt, ‘final approved discount’ includes any

discount, rebate or other incentives applied to that order before, during or after the award of the public tender to ACS or another partner.”

Hayes adds as follows:

“For the avoidance of doubt, should your clients be agreeable in principle to the above category, our clients will ensure to provide the relevant dates in relation to each tender listed.”

32. In its letter of 15th June, 2022, Matheson stated that the proposed reformulated category as set out above was “refused for the reasons set out in previous correspondence. In particular, we note your client has not specified any specific dates for the tenders in contemplation, without which this category is not workable for the purpose of a discovery exercise”.

33. This category was the subject of an extensive notice for particulars and replies by ACS. The “Attachment 9” referred to in the proposed ACS wording arises from a reply at para. 26 (b) of the replies to particulars which, in response to a request for “[e]ach and every instance in which Microsoft Arabia offered lower quotations for Microsoft Licenced Offerings to ACS competitors”, replied “[s]ee attachment 9 which contains a sample list of Microsoft related tenders ACS lost because of the actions of Microsoft since 2014”. Attachment 8 on the other hand is a response to para. 23 of the Notice for Particulars, which addresses the pleas at paras. 35 to 38 of the counterclaim, which deal with the alleged “spreading of untrue and damaging rumours” by the Microsoft entities in relation to ACS’s solvency. It comprises a list of customers which ACS claims terminated their relationship with and/or cancelled orders with ACS as a result of the alleged damaging rumours, and provides various details in relation to the orders and revenue lost.

34. Counsel for ACS asserts that the alleged conspiracy has been particularised in the counterclaim in four separate subparagraphs, and that a “significant amount of particulars with regard to the paragraphs” has been provided. Counsel contends that it cannot be suggested that

ACS is simply making broad allegations, notwithstanding that ACS is not able to identify the competitors who benefited from the alleged conduct of the Microsoft entities, or the rebates which were given in each case. It is said that these are matters known only to the Microsoft entities, who should discover documents in relation to these aspects. It is said that ACS has identified the tenders, and that the Microsoft entities will be provided with specific dates in relation to those tenders so that the documentation required is quite specific.

35. Counsel relies on the dicta of Clarke J. (as he then was) in *National Educational Welfare Board v. Ryan* [2008] 2 IR 816 at para. 5.1 of that judgment (p. 825), in which Clarke J. says as follows:

“This is not, in my view, a case where a mere or bald allegation of fraud is made. The plaintiff has set out in considerable detail the payments which it alleges have been made by the defendants to its former information technology manager. It has also set out, in some detail, the various ways in which it is suggested that the plaintiff may have suffered by reason of the making of those payments (which, of course, it alleges were made as bribes or as secret commissions).”

36. Counsel also relies – not just for the purpose of this category, but generally in relation to all the categories – on paras. 4.5 to 4.7 of the judgment of Clarke J. in *National Educational Welfare Board v. Ryan*. In relation to this category, he relies particularly on the following excerpt from para. 4.5:

“...If a plaintiff who makes an allegation of fraud is required to give full and exhaustive particulars prior to defence (and, thus, prior to discovery or interrogatories) in a manner which necessarily narrows the case, then there is every chance that, in a genuine case of fraud, the perpetrator will escape having to make discovery in respect of aspects of the fraud because the plaintiff will not have been sufficiently aware of the details of those aspects of the fraud to plead them in an appropriate manner in advance. In those

circumstances aspects of the fraud will be outside the case as originally pleaded and will not be caught by any order of discovery or interrogatories.”

37. Counsel refers to the “balancing test” which must be conducted by the court in relation to allegations of clandestine activities such as fraud or conspiracy set out by Clarke J. at para. 4.7 of the judgment:

“A balance between these two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party, in its pleadings, specifies, in sufficient, albeit general, terms, the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a *prima facie* case to that effect, then such a party should not be required, prior to defence and thus prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a *prima facie* case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial.”

38. Counsel for ACS submits that ACS passes this test, and is entitled to seek documentation which will allow it to pursue further lines of inquiry to establish the ambit of the alleged fraud, and exactly how it was conducted.

39. Counsel for MIOL and MACL makes a general point in relation to the way the allegation is pleaded. He points out that para. 39 of the counterclaim alleges an unlawful

conspiracy, and then purports to articulate that conspiracy in five sub-paras of para. 40. However, he points out that most of the particulars relate solely to the actions of Microsoft Arabia. No detail is given as to how that entity is alleged to have been in breach of “Saudi Arabian competition laws and the Saudi Arabian government tenders and procurement laws...”. While allegations are broadly made against MACL, counsel contends that there is no actual detail of any conspiracy, whether an unlawful conspiracy or the lawful means conspiracy pleaded at para. 42.

40. Counsel contends that attachment 8 is simply not relevant to this particular allegation of conspiracy, relating as it does to the previously pleaded allegation of spreading untrue and damaging rumours. He also made complaint in relation to the suggestion in the Hayes wording that what was required was discovery, not just of tenders in which discounts were offered, but also any discount that was applied at any time after that, irrespective of its relationship to the tender. Counsel conceded that a discount that was tendered and afterwards implemented might be relevant, but maintained that all the counterclaimant was entitled to was “documents that demonstrate what was offered in the tenders by way of discount because that is the material upon which the tenders are assessed”. [transcript p. 164 lines 14 to 17].

41. In relation to this latter contention, counsel for ACS stated as follows:

“... [T]he case that we make is that ACS was given the published discount but in fact secretly these competitors were given a better discount. So, it is not going to be anywhere in the public tender document. It is going to be given secretly. It may be the case that some of these competitors were told we’ll apply the discount, the true ... under the table discount after you get the tender. So that’s why we need to see what discount was actually applied after the tender was awarded ...” [transcript p. 167, lines 14 to 23].

42. It is true that most of the particulars do not refer specifically to any allegation of concerted activity between MIOL and MACL at para. 40. However, after particularising the

activities complained of, the counterclaim does plead at para. 41 that "... [i]n acting as it did, Microsoft Arabia was acting on its own behalf and on behalf of its co-conspirator MIOL". Thus, while explicit allegations are made against MACL, it could be said that there is a mere assertion that this amounted to a conspiracy with MIOL. Certainly the allegation of a "lawful means conspiracy" is not fleshed out with any particulars in the counterclaim, and appears merely to be an alternative to the allegation of unlawful conspiracy.

43. On the other hand, while it could be argued that the allegations of conspiracy are somewhat speculative, I think that they have to be seen in the context of the other allegations of conspiracy made. ACS broadly argues that the conspiracies were a part of a campaign on the part of both Microsoft entities to undermine ACS in a number of different ways. In circumstances where very specific allegations are made against Microsoft Arabia in relation to the question of manipulation of Saudi public tenders, I do not think it is too much of a stretch for ACS - if these allegations are correct - to infer the involvement of MIOL, and to seek documentation which would either prove or disprove MIOL's involvement in this alleged activity.

44. I am therefore disposed in principle to allow the discovery sought. I will confine the discovery to the tenders at attachment 9; I do not see the relevance of the material at attachment 8 to this particular allegation. I do not think it is unreasonable for ACS to seek information on the "final approved discount" which may have transpired after the award of a tender; any such discount might be relevant to the allegation, or it might not. I think however that ACS is entitled to inquire into any discount which applies to the order during or after the award of the public tender. An order will therefore be made in relation to the following category:

"All documents relating to, concerning or evidencing the final approved discount [agreed] internally by MIOL and/or Microsoft Arabia in relation to the tenders listed at Attachment 9 to the Replies to Particulars and the communicated discount to ACS. For

the avoidance of doubt, ‘final approved discount’ includes any discount, rebate or other incentives applied to that order before, during or after the award of the public tender to ACS or another partner.”

45. I wish to make clear however that, in accordance with its assurance of 14th June, 2022, the Microsoft entities must be provided with relevant dates in relation to each tender listed, to the extent that any dates have not already been provided in attachment 9.

Categories 35 to 39

46. These categories were the subject of prolonged debate. They relate to the allegations at paras. 57 to 61 of the counterclaim. The essence of these allegations is expressed at para. 57 as follows:

“57. Throughout 2015-2017, MIOL and Microsoft Arabia, acting in combination, unlawfully conspired to injure ACS by unlawful means by initiating multiple unjustified corruption inquiries into ACS and advising ACS’s customers that ACS had been accused of corruption...”

47. Particulars of this allegation are then given in four sub-paragraphs, which allege that the Microsoft entities referred ACS to Microsoft’s financial integrity unit, accusing ACS of having made corrupt payments to Saudi public officials from Microsoft marketing funds. It is alleged that MIOL and MACL sought to damage ACS’s reputation by informing its largest customer, the Saudi Ministry of Health, of allegations of corruption, causing the Ministry to initiate its own investigation into such allegedly corrupt payments. It is stated that the Microsoft investigation cleared ACS of any wrongdoing “... and showed that ACS was acting on the instructions of Microsoft Arabia managers in arranging for the payment of travel and hotel expenses for Saudi public officials using Microsoft marketing funds...”. It is also stated that the Ministry of Health investigation “cleared ACS of any wrongdoing, though it endured for over one year”. Paragraph 58 states that “... [t]he main purpose of the inquiries and

investigation by Microsoft Arabia and MIOL on ACS was to sabotage the sale of Arabsoft and to cause ACS harm with its customers who were informed by the Microsoft Arabia sales team that ACS was under investigation by Microsoft”. Paragraph 59 alleges that, in acting as it did, “... Microsoft Arabia was acting on its own behalf and on behalf of its co-conspirator MIOL”. A plea of unlawful conspiracy to injure ACS by lawful means is made in the alternative at para. 60 “...with the sole or predominant purpose of causing financial loss to ACS”. At para. 61 it is pleaded that, during the currency of the Ministry of Health investigation, ACS was excluded from participating in tenders or being awarded commercial projects, and the payments due by the Ministry to ACS were frozen for over a year. It is alleged that ACS suffered significant financial loss and damage as a result, and that it “... estimates that the commercial value of those lost opportunities is around \$10 million”.

48. In advance of the hearing, an affidavit was filed by Matheson, the plaintiff’s solicitors, sworn by Sam Pailca on 22nd April, 2022. Ms. Pailca is an associate general counsel in Microsoft Corporation’s US legal litigation group. Microsoft Corporation is a multinational technology company headquartered in the United States. I was given to understand that this company (“Microsoft Corp”) is an entirely separate legal entity from MIOL or MACL, and is the ultimate parent of those companies, although I was not informed as to the exact legal relationship between them.

49. The purpose of Ms. Pailca’s affidavit was to address the categories of documents in relation to Microsoft Corp’s investigation of the corruption allegations. She was associate general counsel leading Microsoft Corp’s Office of Legal Compliance (“OLC”), which was responsible for managing Microsoft Corp’s global business conduct compliance programme. OLC attorneys were responsible for advising Microsoft Corp concerning matters related to the company’s compliance with laws and regulations in the jurisdictions where Microsoft does

business, as well as Microsoft's "standards of business conduct". The investigations into the alleged corruption in the present case were conducted by OLC.

50. Ms. Pailca averred as to the essential nature of confidentiality and "the attorney-client privilege" as far as Microsoft Corp's compliance programme was concerned. She avers at para. 11 of her affidavit that "... [t]he privilege applies to communications necessary to gather information to inform legal advice and to provide legal advice ... if communications between OLC attorneys and Microsoft Corp employees were not confidential, OLC may not be able to obtain accurate information and provide frank advice about Microsoft Corp's legal obligations, rights, and risks".

51. Ms. Pailca avers that, in the present case, OLC "initiated and directed two investigations, into among other things, the sales of Microsoft Corp products and services through and by ACS". She goes on to aver that "... [n]o MIOL or MS Arabia employees initiated, directed, or supervised either of these investigations". At para. 17 of her affidavit, she avers that "...all documents and records forming part of the OLC investigations remain confidential and commercially sensitive. Employees of MIOL and MS Arabia do not have any entitlement to obtain access to documents relating to the OLC investigations". In the final paragraph of her affidavit, Ms. Pailca respectfully requested the court "... to refuse the request made by ACS for discovery of any documents relating or connected to the OLC investigations".

52. Counsel for ACS began his submissions by making it clear that the order for discovery was sought against MIOL and MACL, not Microsoft Corp. He submitted that some of the documents sought could only relate to documents in the power, possession or procurement of MIOL or MACL; for instance, category 35 relates to "Any documents relating to, evidencing or concerning the fact of, instigation, and/or conduct of the investigation referred to at paragraph 57 of the Defence and Counterclaim (including, for the avoidance of doubt, any communications with the Ministry of Health)...". He suggested that it seemed reasonable to

assume that there could be documents arising from the conduct of the investigation that are in the possession of the Microsoft entities, and pointed out that category 36 related only to “communications between Microsoft Arabia and MIOL regarding the investigation ...”. Likewise, category 39, which sought “Any communications between MIOL and/or Microsoft Arabia and ACS customers regarding any of the Microsoft Business Investment Funds or marketing funds allocated by Microsoft Arabia to ACS customers through ACS...” did not make any reference to documents generated by Microsoft Corp.

53. Counsel stated that “...at the moment the order would be sought only as against MIOL and Microsoft Arabia ... I am assuming ... that if the court does order discovery of these documents that the affidavit of discovery would be very clear that it does not include documents in the possession of Microsoft corporation ...” [transcript, p. 172 lines 12 to 19]. However, he did not rule out the possibility that the information elicited from the listed documents might suggest that ACS had “... a present, enforceable legal right to demand that Microsoft Corp produce them ...” [transcript, p. 172 lines 26 to 28]. It was submitted that, if MIOL or MACL were to assert privilege over documents which related to the Microsoft Corp investigation, ACS would be entitled “to see the listing of it”, and presumably to interrogate the basis for that privilege. It was accepted by counsel for MIOL and MACL that, as a general rule, a claim of privilege could not be advanced to defeat an application for discovery; the appropriate procedure was that documents which are relevant and necessary and in the normal way discoverable should be listed, subject to a claim of privilege, the basis for which should be stated in the affidavit.

54. Counsel for the Microsoft entities emphasised the obligation in the rules of the Superior Courts under O. 19 r. 5 to particularise a plea of conspiracy, and accepted that the appropriate test of whether such a plea had been sufficiently set out was the “balance of considerations” test set out by Clarke J. in *National Educational Welfare Board v. Ryan* referred to above.

Counsel submitted that ACS had plainly not particularised the allegation of conspiracy. It was suggested that the pleas in para. 57 of the counterclaim were simply statements without details of either the conspiracy or of the unlawfulness. There were “.. no details of the alleged combination, no details of the alleged unlawfulness, no details of the identity of the officials said to be corrupted, no details of which of [ACS’s] officers are said to have made the allegation, no details of which of the Defendants’ officers are said to have attempted to engage in corrupt activities, no details of the alleged lawful means conspiracy and no details of loss...” [transcript p. 192, lines 3 to 11].

55. In relation to the confidentiality of the documents, counsel confirmed that he was “not relying on the privileged nature of the documents at this stage...”. He did say however that the “undisputed evidence” [in an affidavit sworn by Jesus Del Pozo Moran on behalf of the Microsoft entities of 25th April, 2022] “...is that this is a confidential process, that these are confidential documents, that everything generated in the course of this investigation is confidential and that is confirmed ...” [by the affidavit evidence of Mr. Del Pozo Moran]. Counsel submitted that, in carrying out the balancing act required by the test in *National Educational Welfare Board*, this confidentiality was a factor which should militate towards a conclusion that it is not appropriate to make an order for discovery.

56. It was also submitted that category 37, which seeks documents relating to instructions and/or communications between the Microsoft entities and ACS’s customers seeking to arrange or suggest that ACS provide payments which were part of the investigation, and category 38, which relates to actions taken by the Microsoft entities following the investigation including but not limited to the termination of the contracts of certain named executives and managers of Microsoft Arabia, were not categories that arose from the pleadings.

57. In respect of these categories, I have considered carefully the “balance of considerations” test laid down by Clarke J. in *National Educational Welfare Board*. I do not

think it can be said of ACS that they have made “a bare allegation of fraud”. On the face of the counterclaim, the investigations by Microsoft Corp and the Ministry of Health damaged ACS and caused it loss. The counterclaim suggests that both investigations were resolved in ACS’s favour. ACS’s allegation as to the nature of the conspiracy is clear in general terms. It also refers specifically in particulars to the identity of customers who were informed by MACL sales team members that ACS was under investigation, and in respect of the Ministry of Health allegation, provides details of the new business with the Ministry which ACS alleges it lost. While a general figure of 10 million dollars in relation to loss has been given, it is not uncommon for a statement of claim to provide a general figure which will subsequently be refined and substantiated in the course of the proceedings.

58. There is no doubt that the pleadings are somewhat bare in relation to the question of whether MIOL and MACL conspired to bring about these investigations. However, once again I think that the allegation must be seen in the context of the proceedings as a whole, and ACS’s position that this was just one of a number of actions taken by the Microsoft entities to damage ACS. While ACS is relatively clear as to the damage done by the holding of the inquiries which it appears exonerated ACS, it does not give particulars of how the conspiracy – if there was one – was effected, but this is perhaps to be expected in respect of what is in essence a clandestine activity.

59. With some misgivings, I am of the view that I should order discovery of categories 35 to 39 in terms of the request on behalf of ACS in Hayes letter of 6th May, 2022. I am mindful that, if there is substance to the allegation, a refusal of discovery would make it impossible for the Microsoft entities to pursue it. On the other hand, the burden of proof remains with ACS, and the documentation it seeks may well assist it in either helping it prove its case, or establish to its satisfaction that its suspicions are unfounded.

60. The position in relation to the documentation held by Microsoft Corp is clear. Discovery is not being sought against that entity, and documents held by it will not be the subject of this court's order. There is no suggestion at the moment that any documentation held by Microsoft Corp which is relevant to these categories is within the power or procurement of MIOL or MACL.

61. However, the Microsoft entities must comply with the orders as made. To the extent that privilege is claimed in respect of certain documents, that privilege must be identified in the affidavit of discovery in the normal way. On receipt of the affidavit, ACS may form its own view as to the privilege claimed and take whatever action it considers appropriate.

62. Lastly, in relation to paras. 37 and 38, I accept the submission of counsel that category 37 logically arises from the allegation made at para. 58 of the counterclaim. In relation to category 38, I accept that actions taken or not taken by MIOL and/or Microsoft Arabia in relation to the named individuals who authorise the payments to be made may have relevance to the knowledge of MIOL or MACL in relation to these payments in the first place. The category is also linked to the allegation at para. 57.3, which asserts that "...[t]he Microsoft investigation ... show that ACS was acting on the instructions of Microsoft Arabia managers in arranging for the payment of travel and hotel expenses for Saudi public officials using Microsoft marketing funds...".

Conclusion

63. Given that agreement appears to have been reached on the plaintiff's motion for discovery, I take it that no order is required from this court in relation to that motion. In respect of the ACS motion, I would ask the respective solicitors to liaise in relation to drawing up a draft order based on the findings and conclusions in this judgment. The parties should also consider what, if any, other orders require to be made, including in relation to the question of

costs. In the event that the parties are unable to agree the terms of an order, I will give liberty to apply so that any outstanding issues can be resolved.